

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF DELAWARE**

**JULIAN A. MILLER**

**C.A. No. 04-1367**

**Plaintiff,**

## JURY OF 12 DEMANDED

**V.**

**STANLEY TAYLOR, ET. AL**

**Defendants,**

## **DEFENDANT IHUOMA CHUKS' MOTION TO DISMISS**

1. Plaintiff is an inmate in the Delaware correctional system.
2. Defendant First Correctional Medical, hereinafter “FCM”, was the health care provider for the Delaware correctional system from July 1, 2002 through June 30, 2005. Defendant Ihuoma Chuks was an employee of First Correctional Medical.
3. Plaintiff filed his complaint on October 18, 2004, alleging Eighth Amendment violations that occurred while he was incarcerated. Plaintiff’s complaint was not accompanied by an affidavit of merit or a motion to extend the time for filing an affidavit of merit.
4. Plaintiff filed this suit in 2004 while FCM was still the health care provider for the Delaware correctional system and Defendant Chuks was an employee of FCM. D.I. 2. Defendant Chuks has never been served in this matter.

## Legal Standards

5. Pursuant to Rule 4(m), an action “shall be dismissed” as to a defendant who was not served within 120 days of the filing of the complaint when the party on whose behalf such service was made cannot show good cause why service was not effected in the required period.

6. Pursuant to 18 *Del. C.* § 6853 (a)(1), an affidavit of merit must accompany a medical negligence complaint filed after October 9, 2003, or “the clerk of court shall refuse to file the complaint and it shall not be docketed with the court.”

7. Where the Clerk of Court or Prothonotary mistakenly accepts a medical negligence complaint without an affidavit of merit, the defendant’s remedy is a dismissal. *Jackson v. First Correctional Medical Services*, 380 F. Supp. 2d 387, 392 (D. Del. 2005).

8. Under these legal standards, defendant Ihuoma Chuks submits that dismissal is warranted because (1) without good cause, more than twenty-three (23) months have passed and service has still not been perfected against defendant Chuks; and (2) plaintiff failed to file an affidavit of merit or motion to extend the time for filing an affidavit of merit.

Plaintiff Has Failed to Serve Defendant Chuks Within 120 Days

9. More than twenty-three (23) months transpired from the filing of the Complaint in this matter to present and defendant Chuks has still not been served. Plaintiff has not demonstrated good cause as to why defendant Chuks was not served within 120 days of the filing of the complaint. Pursuant to F.R.C.P. 4(m), the Court shall dismiss a suit where the time for service has exceeded 120 days and there has been no showing of good cause.

Plaintiff has Failed to File an Affidavit of Merit

10. Plaintiff’s complaint was filed after October 9, 2003, and was not accompanied by either an affidavit of merit or a motion to extend the time for filing such affidavit. As such, plaintiff’s state law claims must be dismissed as a matter of law. *Jackson*, 380 F. Supp. 2d at 392.

Conclusion

11. For the above reasons, defendant Chuks respectfully requests that all claims against her be dismissed with prejudice.

**McCULLOUGH & McKENTY, P.A.**

/s/ Dana Spring Monzo

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Attorneys for defendant Ihuoma Chuks

Dated: September 19, 2006

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FOR THE DISTRICT OF DELAWARE**

<b>JULIAN A. MILLER</b>	)	
	)	
	)	<b>C.A. No. 04-1367</b>
	)	
<b>Plaintiff,</b>	)	<b>JURY OF 12 DEMANDED</b>
	)	
<b>v.</b>	)	
	)	
<b>STANLEY TAYLOR, ET. AL</b>	)	
	)	
<b>Defendants,</b>	)	

**CERTIFICATE OF SERVICE**

I, Dana Spring Monzo, do hereby certify that on this date a copy of ***Defendant Ihuoma Chuks' Motion to Dismiss*** was served electronically upon the following individuals:

Sean P. Hayes, Esquire  
Fish & Richardson, P.C.  
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Stephani J. Ballard  
Department of Justice  
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C.A. No. 04-1367

JURY OF 12 DEMANDED

**ORDER**

And now this \_\_\_\_\_ day of \_\_\_\_\_, 2006, having considered  
*Defendant Ihuoma Chuks' Motion to Dismiss* and any opposition thereto,  
it is HEREBY ORDERED that *Defendant Ihuoma Chuks' Motion to Dismiss* is granted.

\_\_\_\_\_  
J.